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EXCERPTS OF PETITION OF BRENDAN SULLIVAN VERIFIED APRIL, 1972

STATE OF NEW YORK
SUPREME COURT : NEW YORK COUNTY

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In the Matter of the Application

of

BRENDAN SULLIVAN,

Petitioner,

PETITION
Index No.

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent,

For an Order Under Article 78 of the Civil Practice Law & Rules.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner, by MIRKIN, BARRE, SALTZSTEIN, GORDON & LEVINE, ESQS., his attorneys, respectfully shows and represents to this Court:

1. Petitioner, BRENDAN SULLIVAN, was employed since 1966 by the DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, the respondent herein, and has held the position of caseworker in the Competitive Classified Civil Service of the City of New York, and was employed at the Veteran Assistance Social Service Center Office (05) in the County and State of New York.

2. On October 26th, 1971, petitioner was stricken with severe illness, including the following symptoms: a severe diarrhea, nausea, nervous tremors and loss of weight, which symptoms, due to their intensity, thoroughly incapacitated petitioner and prevented him from pursuing his normal work patterns. On such date, petitioner immediately telephoned a co-worker in his office informing him of the nature of his illness and requesting that he communicate with the supervisor.

15. Respondent's determination to terminate Petitioner resulted from an error of law on the part of Respondent in that Respondent's authority, if any, to remove Petitioner flowed exclusively from Rule 6.4.6 of the Civil Service Rules which permits termination only under the strict language set forth in said rule. Inasmuch as Petitioner notified respondent through its agents, servants and employees, the Personnel Relations office, the Supervisor and the Director, all within the twenty day period, there was thus no absence for twenty consecutive work days without notice. Thus, respondent's termination of Petitioner was an error as a matter of law.

16. Respondent's determination was arbitrary and capricious in that it *inter alia* was made without the benefit of any information which could have been furnished by the Petitioner and any witnesses he may have produced in his behalf.

17. Respondent's determination constituted an abuse of discretion.

18. Respondent in terminating Petitioner without a hearing as provided in Sect. 75 of the Civil Service Law, proceeded without and in excess of its jurisdiction.

19. Respondent in terminating Petitioner arbitrarily, without a hearing or other elements of due process violated Petitioner's rights under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 6 of the New York State Constitution.

20. Petitioner brings the instant application pursuant to Article 78 of the Civil Practice Law and Rules and within one hundred twenty (120) days of the date on which he received notice from the Respondent of his termination.

21. No previous application for the relief sought herein or for similar relief has been made.

WHEREFORE, Petitioner prays for a judgment ordering Caseworker and restore him upon the payroll of the Department

of Social Services, and to pay Petitioner the salary for such position from March 20th, 1972 to the time he is reinstated, and for such other and further relief as is just and proper, together with the costs and disbursements of this proceeding.

MIRKIN, BARRE, SALTZSTEIN,
GORDON & LEVINE, ESQS.
Attorneys for Petitioner
Office & P.O. Address
98 Cutter Mill Road
Great Neck, New York 11021

(Duly Verified April 1972)

Opinion of Justice Frank

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL CALENDAR : PART IV
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In the matter of

BRENDAN SULLIVAN

Petitioner

against Index No. 9496/72

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent,

For an order under Article 78 of the Civil Practice Law & Rules
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FRANK, J.:

This is an application pursuant to Article 78 of the CPLR for an order compelling the respondent to reinstate the petitioner to his position as caseworker or for alternative relief. Rule 6.4.6 of the Civil Service Commission provides that when an employee absents himself without leave and fails to communicate with his department in the manner prescribed by his department for a period of twenty consecutive work days, such absence shall be deemed to constitute a resignation effective on the date of its commencement unless the appointing officer, in his discretion, sees fit to accept an explanation for such unauthorized absence. Because of petitioner's alleged violation of the aforementioned rule, his absence for a twenty day period after November 23, 1971 was deemed by the respondent to constitute his "resignation" from his position of caseworker effective at 9:00 A.M. on that date.

Generally, an employee who is discharged from his governmental position without a hearing need not seek reinstatement

within four months from his discharge but he may delay until he has demanded reinstatement and has been refused. However, he may not unduly delay in seeking reinstatement since he may then be charged with laches (Austin v. Board of Higher Education, 5 N Y 2d 430, 442 [1959]; Matter of Burke v. Village of Johnson City, 36 A D 2d 202 [3rd Dept. 1971]; Matter of O'Buck v. City of Yonkers, 2 A D 2d 775 [2nd Dept. 1956]). In this proceeding, respondent contends that it mailed a letter dated December 23, 1971 to the petitioner to inform him that his absence was being deemed a "resignation." This letter was admittedly returned on January 15, 1973 in the original envelope, which had been marked "unclaimed" by the Post Office. An envelope that is marked "unclaimed" indicates that no notice was received by the defendant; furthermore, this postal mark does not carry the connotation that the failure to receive the envelope was due to any act of the defendant (cf. Grandison v. College Truck Renting Corp., 26 A D 2d 260 [1st Dept. 1966]) Thus, even if the allegations in the answer are accepted as true, the respondent did not actually inform the petitioner that he was deemed to have resigned until Dorothy L. Omansky, a Personnel Director of the respondent, informed him of that fact over the telephone or or about March 28, 1972. In any event, the documentation would tend to indicate that the petitioner's demand for reinstatement was not refused until early April, 1972. Under these circumstances, this procedure must be considered timely under CPLR § 217 since it is made within four months after respondent's written refusal to reinstate the petitioner.

Under the Civil Service Law § 75, subd. 1(a), a person, who holds a position by permanent appointment in the competitive class of the classified civil service, shall not be removed or otherwise subjected to any disciplinary penalty except for incompetency or misconduct shown after a hearing upon stated charges. There is authority for the proposition that a petitioner, who is deemed to have resigned for his unauthorized absences, is not later entitled to a fair hearing under Section 75 of the Civil Service Law. (Matter of Dunn v. Simon, 16 A D 2d 719 [3rd Dept. 1962]). On the other hand, such a petitioner has been accorded a hearing upon charges (Matter of Hayward v. Cornelius, 30 A D 2d 901 [3rd Dept. 1968]). However, it would appear to this Court that, even though a petitioner is being removed from the civil service through a device denominated a "resignation," the latter is, in fact, being discharged from employment for alleged misconduct upon his part. Therefore, a

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caseworker in the competitive classified Civil Service of the City of New York, such as the present petitioner should be accorded a fair hearing under the Civil Service Law.

Accordingly, the application is granted only to the extent of remanding this matter to afford the petitioner a fair hearing as is provided for in Section 75 of the Civil Service Law.

Settle judgment.

Dated: July 7, 1972.

J.S.C.

EXCERPTS OF VERITIFED PETITION
DATED MARCH 23, 1973

STATE OF NEW YORK
SUPREME COURT : NEW YORK COUNTY
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In the Matter of the Application

of

BRENDAN SULLIVAN,

Petitioner

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent

VERIFIED PETITION
Index No. 9496/72

For an Order under Article 78 of the Civil Practice Law & Rules.
----------x

TO THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner, by MIRKIN, BARRE, SALTZSTEIN, GORDON & LEVINE, ESQS., his attorneys respectfully shows and represents to this Court:

1. Petitioner, BRENDAN SULLIVAN, was employed since 1966 by the DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, the Respondent herein, and has held the position of caseworker in the Competitive Classified Civil Service of the City of New York, and was employed at the Veteran Assistance Social Service Center Office (05) in the County and State of New York.

2. From approximately October 16, 1971, to on or about March 20, 1972, Petitioner was stricken with severe illness and received medical care and treatment therefor during said period of time.

13. Respondent has refused to reinstate the Petitioner, has refused to pay him back pay, and has refused to calendar a hearing, all in direct and flagrant contradiction of the pertinent law of the State of New York and the law of this case.

14. Petitioner is in dire economic straits and it is realistic to assume that he is in imminent danger of becoming a public charge. Respondent's original determination and subsequent conduct has been arbitrary, capricious, an abuse of discretion, an abuse of legal process, a violation of the laws of the State of New York and a violation of due process clauses of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

15. Petitioner brings the instant application pursuant to Article 78 of the Civil Practice Law and Rules and respectfullly seeks *immediate* reinstatement to his position as caseworker and restoration upon the payroll of the DEPARTMENT OF SOCIAL SERVICES as well as back salary and all benefits due and owing to him from March 20, 1972, to the time such reinstatement is effective.

16. No previous application for the relief sought herein or for similar relief has been made except for the original petition submitted herewith as Petitioner's Exhibit 1.

WHEREFORE, Petitioner prays for a Judgment ordering the Respondent to reinstate Petitioner forthwith to his position as caseworker and restore him upon the payroll of the DEPARTMENT OF SOCIAL SERVICES, and to pay Petitioner the salary for such position from March 20, 1972, to the time he is reinstated with the interest due and owing thereon and to restore to Petitioner any accrued benefits on the grounds that Respondent is in flagrant violation of the maximum suspension period pending determination of charges set forth in Section 75 of the Civil Service Law of the State of New York, and for such other and further relief as is just and proper, together with the costs and disbursements of this proceeding.

Dated: Great Neck, New York
March 23, 1973.

MIRKIN, BARRE, SALTZSTEIN,
GORDON & LEVINE, P.C.
Attorneys for Petitioner
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98 Cutter Mill Road
Great Neck, New York 11021
(212) 895-7160

(Duly verified March 1973)

Opinion of Justice Gellinoff, dated June 5, 1973

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL CALENDAR : PART IV

In the Matter of the Application

of

BRENDAN SULLIVAN,

Petitioner,

against

Index No. 9496/1972

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent,

For an Order under Article 78 of the Civil Practice Law and Rules.

GELLINOFF, J.:

By decision dated April 10, 1973, this court granted petitioner's application for relief pursuant to Article 78, unless respondent conducted the fair hearing previously mandated. Petitioner now moves to make that determination the final judgment in this matter, claiming that the hearing conducted by respondent did not comply with the previous orders.

The application is denied. The fact that in conducting a hearing pursuant to Section 75 of the Civil Service Law – as had been directed – respondent chose to enlarge the scope of charges beyond that previously relied upon in discharging petitioner, does not render the proceedings improper. Petitioner was given ample notice of the charges prior to the hearing.

Additionally, nothing in the statute nor in the previous decisions in this case required respondent to reinstate petitioner prior to conducting the hearing, as was urged by petitioner's counsel prior to his withdrawal from the hearing.

Settle order.

Dated: June 5, 1973

J.S.C.

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Order of Affirmance

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 22, 1974.

Present—
HON. ARTHUR MARKEWICH,
Justice Presiding,
" FRANCIS T. MURPHY, JR.,
" ARON STEUER,
" GEORGE TILZER,
" LOUIS J. CAPOZZOLI,
Justices.

579

BRENDAN SULLIVAN,

Petitioner-Appellant,

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Gellinoff, J.), entered on October 9, 1973, denying petitioner's application and dismissing the petition, and said appeal having been argued by Mr. David J. Agatstein of counsel for the appellant, and by Mr.

Order of Affirmance

Francis F. Caputo of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements, and without prejudice to such plenary action as petitioner may be advised to pursue in respect of a claim for back pay.

Enter:

Hyman W. Gamso
Clerk

Memorandum Decision

MARKEWICH, *J.P.*, MURPHY, STEUER, TILZER, CAPOZZOLI, *JJ.*

579

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BRENDAN SULLIVAN,
Petitioner-Appellant,
D. J. Agatstein,

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,
Respondent-Respondent,
F. F. Caputo.

———o———

Judgment, Supreme Court, New York County (GELLINOFF, *J.*), entered October 9, 1973, denying petitioner's application and dismissing the petition, unanimously affirmed, without costs and without disbursements. Our affirmance is without prejudice to such plenary action as petitioner may be advised to pursue in respect of a claim for back pay.

Order filed.

A-13

STATE OF NEW YORK

COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

1 No. 119

BRENDAN SULLIVAN,

Appellant

vs.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Respondent.

MEMORANDUM

By a letter dated December 23, 1971 respondent attempted to notify appellant that, pursuant to Rule 6.4.6 of the Rules of the City Civil Service Commission of the City of New York, his absence since November 23, 1971 was deemed to constitute a resignation from his position of caseworker. In an article 78 proceeding seeking reinstatement and restoration to payroll, a judgment was made at a Special Term on January 11, 1973 granting the application "only to the extent that this matter be remanded to Respondent, for a full and fair hearing as provided for in Section 75 of the Civil Service Law." No appeal was taken therefrom and negotiations between the parties were not consummated in settlement. In a second article 78 proceeding, an order was entered April 11, 1973 granting appellant's petition unless within ten days after service respondent conducted the fair hearing mandated by the "order" of January 11, 1973. Thereafter charges and specifications, setting forth alleged excessive lateness and excessive absences by appellant in violation of department rules and regulations, as well as having "absented himself from October 16, 1971 to March 9, without authoriza-

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tion and without presenting medical statements required by departmental procedures" (sic), were served upon appellant, together with notice of a hearing.

In order to comply with the court order and with the provisions of section 75 of the Civil Service Law, respondent necessarily gave to appellant written notice of the proposed removal or other disciplinary action, as well as the reasons therefor, and furnished him with a copy of the charges preferred. The hearing was conducted 13 days after said notice and service. There has been now showing that appellant was deprived of a fair hearing (see *Matter of Sowa* v. *Looney*, 23 N Y 2d 329, 333-334), and there was no error in proceeding with the hearing in the absence of appellant and his counsel, after counsel claimed lack of jurisdiction and then refused to participate *(Matter of Grottano* v. *Kennedy*, 5 N Y 2d 381, 388-389). Since respondent's determination sustaining the charges was supported by substantial evidence and since the penalty of dismissal as imposed was not in excess of jursidiction, in violation of lawful procedure, arbitrary or in abuse of discretionary power, there was no alternative but to confirm *(Matter of Pell* v. *Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Memaroneck, Westchester County*, 34 N Y 2d 222, 231).

The order of the Appellate Division, made without prejudice to such plenary action as petitioner may be advised to pursue in respect to his claim for back pay, should be affirmed, with costs.

* * * * *

Order affirmed, with costs, in a memorandum. All concur.

Decided March 24, 1975

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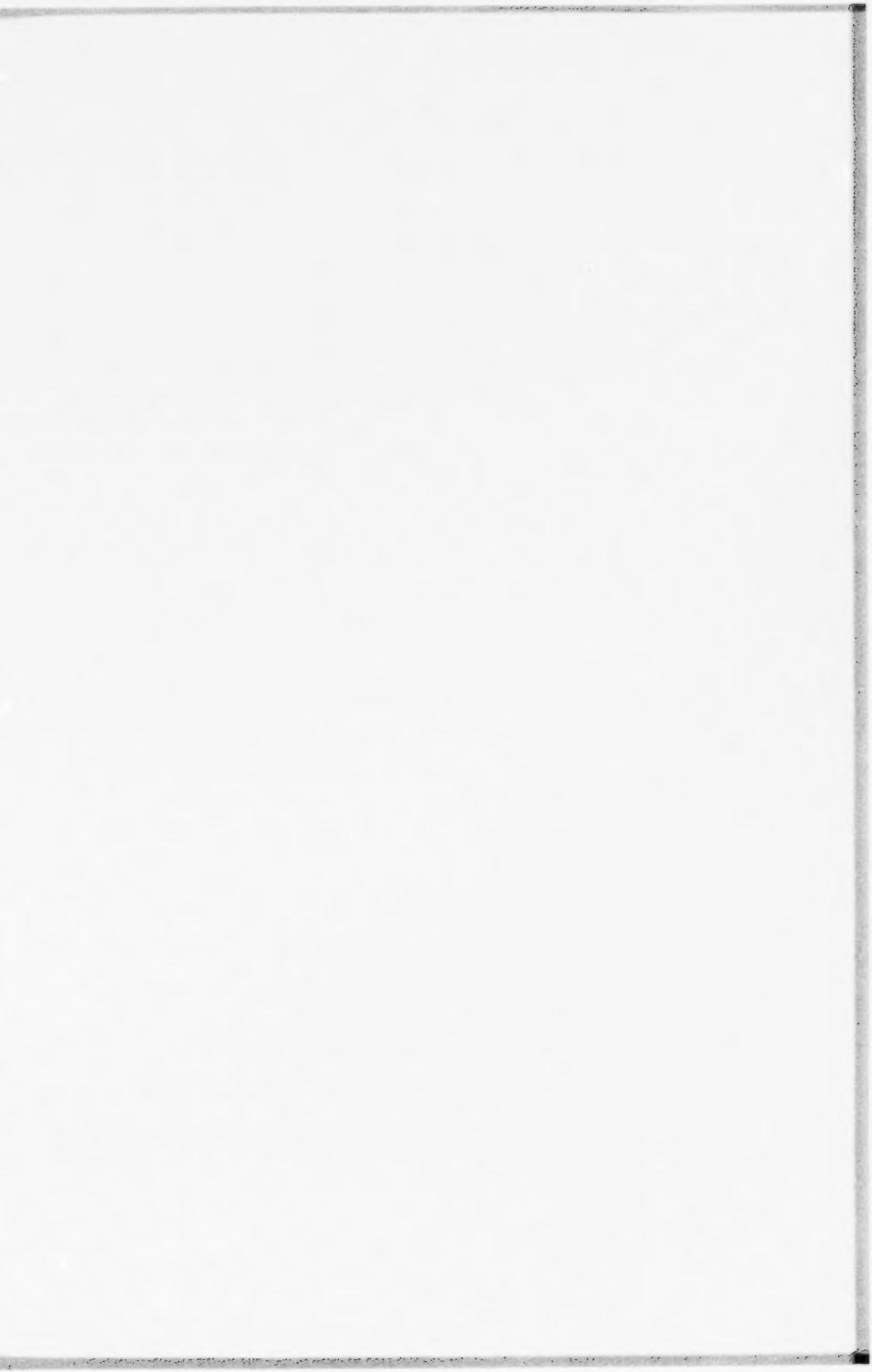

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